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In the Supreme Court

of the United States

OCTOBER TERM, 1963

No. 841

HOISTING & PORTABLE ENGINEERS, LOCAL UNION NO. 701, of the International Union of Operating Engineers, P. R. "RED" WAGES, CARL REAMS and HERBERT SCHELL,

Petitioners,

v.

CHARLES E. GILBERT, J. L. SALEEN, GEORGE H. GRAVATT, HYRUM COX, F. W. MOORMAN and DEAN STEELMAN, for themselves and on behalf of all of the members of HOISTING & PORTABLE ENGINEERS, LOCAL 701,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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Hoisting & Portable Engineers, Local Union No. 701, I.U.O.E., P. R. Wages, Carl Reams and Herbert Schell, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Oregon entered in the above case on July 31, 1963.

OPINIONS BELOW

The opinion of the Court below (Appendix A, *infra*, pp. A1 thru A8) is not yet officially printed in the Oregon Reports. It is reported in 384 P2d 136.

Three Memorandum Opinions of the Circuit Court of Oregon for Multnomah County (the trial Court) are unreported, but are reproduced in printed form in Appellants' Abstract of Record, which has been certified as part of the record in this Honorable Court.[1] An Opinion denying a motion to strike the Complaint appears at pages 8-10; an Opinion overruling a demurrer to the Complaint appears at pages 16 and 17; and an Opinion on the merits after trial appears at pages 26-35.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on July 31, 1963. A timely petition for rehearing was filed and was denied, without opinion, on September 17, 1963. On December 11, 1963, Mr. Justice Douglas made an Order herein providing in pertinent part:

> "the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Feb. 14----1964."

Petitioners seek to obtain their rights, privileges and

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[1] RULE 16 of the rules of the Supreme Court of Oregon provides in part: . . . "A copy of the circuit court's opinion may be printed in the abstract." (222 Or. [13]). Nine additional copies of the printed Abstract of Record are being filed with this Petition so as to present these trial court Memorandum Opinions in conformity with Rule 23 (i) of this Court.

immunities set up and claimed under the Constitution and statutes of the United States, drawn into question before the state courts, and, as petitioners contend, denied to them in the state courts.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Are state courts obligated to observe the procedural and substantive provisions of Section 501 (a) and (b) of the Labor Management Reporting and Disclosure Act (29 U.S.C. 501 (a) and (b)) in passing upon a cause of action based upon alleged breach of fiduciary duties and responsibilities by officers of a labor organization whose activities affect commerce within the meaning of the Act?

2. Could the state courts of Oregon constitutionally exercise powers of visitation over a labor organization whose activities affect commerce, where there was no proof of violation of existing law, federal or state, simply to satisfy those courts' ideas of what was proper trade union democracy?

3. Does the Fourteenth Amendment to the Constitution as it adopts and makes applicable to the states the guarantees of the First Amendment, prohibit state courts from enforcing their judgment concerning the proper conduct of those affairs offends any applicable statute or the internal laws of the organization?

4. May a state appellate court of final jurisdiction

affirm a state trial court's determination of fundamental issues upon a theory not expressed in the pleadings, expressly disavowed in the trial court, which alters the fundamental basis of the case, consonant with the Due Process Clause of the Fourteenth Amendment of the Constitution?

5. Is it violative of the Due Process Clause of the Fourteenth Amendment to the Constitution for a state court of final jurisdiction to ground its decision upon a theory not expressed or tried in the lower court and not supported by the record presented to the state appellate court?

STATEMENT OF THE CASE

Petitioners here are defendants below. Local Union 701 of the International Union of Operating Engineers, AFL-CIO, is the principal petitioner. Joined with Local 701 are three individual officers of that organization. The original complaint they were called upon to meet called for their removal from office, for a receivership and accounting; for restitution, and for other miscellaneous relief. Plaintiffs, respondents here, were members of Local 701 who sued on their own behalf and for all other similarly situated members of Local 701. (Abstract of Record, pp. 1-6; 21-22; and 26).[2]

Appeal was taken to the Supreme Court of Oregon, the highest state tribunal to which appeal might be made.

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[2] Nine additional copies of the Abstract of Record have been provided. References thereto throughout this petition will hereafter be noted by "Ab. ."

from certain portions of the trial court's determination, namely:

(a) visitorial audits quarterly for a period of one year;

(b) general retention of jurisdiction over any complaints that might be made concerning alleged failure to comply with the internal laws of the organization; and

(c) Allowance to plaintiffs' attorneys of a fee of $8500.00.[3]

The case primarily involved alleged failure of local union officials to observe their fiduciary responsibilities (Ab. 8-10). From these charges they were exculpated (Ab. 26-35).

Nevertheless, the trial court thought it followed that the counsel for the plaintiffs should be allowed an attorneys' fee of $8500.00. The trial court also believed that undefined "democratic processes" would better be insured if it retained jurisdiction, provided for supervision of four quarterly audits, and arranged its own "observers" for a pending election for local union offices.

How The Federal Questions Arose

Initially the complaint was attacked by Motion to Strike, for including several causes of suit not separately stated (Ab. 6-8). In argument thereon it was contended that every allegation was evidentiary of the primary cause of complaint, alleged misappropriation and misapplication of funds and failure to account (Ab. 8-10).

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[3] Another item appealed from was reversed by the Supreme Court of Oregon (page A 8 of this Petition).

Upon this theory defendants, petitioners here, demurred, asserting that the complaint had not been filed with leave of court, and that there were no allegations that Local 701 or its officers had not, on the face of the complaint, been complained to and had failed or refused within a reasonable time to take appropriate steps to obtain restitution and an accounting (Ab. 10-16). The demurrer was overruled (Ab. 17-18).

Following trial the findings of the court were expressed in a Memorandum Opinion (Ab. 26-35). No breach of fiduciary duties and responsibilities, within the meaning of Section 501 (a) of the LMRDA, was found. No "recovery" was allowed.

Notwithstanding these findings counsel fees in a substantial sum were allowed plaintiffs; court named CPA's were to participate in four quarterly audits; and jurisdiction was retained so as to make the court available as a visatorial monitor in case of some as yet unknown and unexpected violation of the organization's own internal laws.

In the trial court the federal questions involved were raised by defendants' demurrer (Ab. 10-16); and by their Motions to Dismiss made after plaintiffs rested their case in chief (Tr. 407; 409-410).[4] The basic federal issue involving the applicability of Section 501 (b) of the LMRDA was also presented to the trial court on proceedings concerning allowance of attorneys' fees to plaintiffs after trial (Ab. 63, 64).

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[4] The reference "Tr." is to the court reporter's Transcript of Proceedings which has been certified as part of the record herein.

These questions were raised by your petitioners in their appeal to the Supreme Court of Oregon (See the entire Combined Abstract of Record and Brief, filed by these petitioners, then "defendants-appellants").

The opinion of the Supreme Court of Oregon opened additional federal questions concerning "due process." It grounded its affirmance of the trial court upon the theory that the trial court had a right to protect plaintiffs as to a fair forthcoming election (See page A3 of this Petition). This issue was neither presented by the pleadings or otherwise to the trial court (Ab. 33). The Supreme Court of Oregon also based its affirmance upon allegations which were not found to be true by the trial court and which were not substantiated by the evidence.

These new issues were presented, following receipt of its Opinion, in a Petition for Rehearing to the Supreme Court of Oregon, which is included in the record certified to this Court. The Petition for Rehearing was denied, without opinion, on September 17, 1963.

REASONS FOR GRANTING THE WRIT

The opinion of the Supreme Court of Oregon is, so far as we are aware, the first state court reported decision passing upon the issues whether or not a state court must observe Section 501 (b) of the LMRDA, despite the general language of Section 603 (a) of that Act. These issues are quite likely to arise in a variety of situations in the several states and it is of public importance that this Court give guidance in a troublesome and difficult area.

In Section 501 (b) Congress went to detailed draftsmanship to outline procedures for both state and federal courts. It is arguable that in Section 603 (a) the Congress threw these detailed and carefully fashioned procedures to the far winds. This could not have been the reasoned intention of the Congress.

A primary purpose of the LMRDA was reasonable uniformity of fiduciary standards to be exacted of labor union officials. The statute (29 U.S.C. 501 (a)) is stringent, yet takes account of the special and difficult problems which may be involved in the handling of trade union funds and property. Uniformity and certainty of remedy were equally important to the Congress.

This Court must inquire whether the Congress truly meant, by the general and loose language of Section 603 (a) to permit 50 varieties of remedies for breach of labor union officials' fiduciary duties and responsibilities. In the inquiry this Court cannot ignore the basic fact that the Congress itself carefully outlined and defined the remedy available in both state and federal courts for such breach.

It is submitted that the Congressional intention was that the careful particulars contained in Section 501 (b), should prevail over the sweeping and undiscriminating generalities contained in Section 603 (a).

The additional issues, concerning deprivation of due process, turn upon the handling of this case in the trial court and, particularly, in the Supreme Court of Ore-

gon. (See Appellants' Brief, Reply Brief, and, particularly, their Petition for Rehearing.)

CONCLUSION

It is submitted that this case should be reviewed and reversed for failure of the Oregon courts to consider and apply Section 501(b) of the LMRDA. It is also submitted that the Oregon courts failed to accord to petitioners "due process of law" in the particulars stated.

Respectfully submitted,

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